



Department for  
Business, Energy  
& Industrial Strategy

# SMALL BUSINESS COMMISSIONER: POLICY FOR SECONDARY LEGISLATION

Government response and Draft Regulations



February 2017

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## Ministerial foreword



I am delighted to publish this government response and draft Regulations. Whilst technical, covering the policy underpinning the Commissioner's complaint handling function, this is an important step on the way to creating the office.

We are confident that these Regulations will support the Commissioner, to be appointed later this year, to resolve small business complaints about payment related issues with larger businesses and effect a culture change in the way businesses deal with each other.

I would like to thank all those who took the time to submit comments. We have used them to draft the secondary legislation and this is provided for comment. Please do review the draft Regulations. Details of how to comment and the timetable for doing so are provided below.

A handwritten signature in black ink that reads "Margot James".

**MARGOT JAMES MP**

Minister for Small Business, Consumers and Corporate Responsibility

# 1. Executive summary

- 1.1 This document sets out the government's response to the consultation on the Small Business Commissioner: Policy for Secondary Legislation which took place between 13 October and 7 December 2016. The consultation document can be found at [www.gov.uk/government/consultations/small-business-commissioner-process-for-handling-complaints](http://www.gov.uk/government/consultations/small-business-commissioner-process-for-handling-complaints).
- 1.2 The consultation focused on the Small Business Commissioner's (SBC) complaints scheme and specifically: small businesses in scope of the SBC's services; making complaints under the SBC complaints scheme; how the SBC will consider and determine complaints and make recommendations and how the SBC will publish reports and recommendations on complaints.
- 1.3 A total of 23 responses to the consultation were received. These broadly supported the approach set out in the consultation document. The key message from respondents was that the Regulations should be simple so that the SBC's processes are as efficient and effective as possible. Also there was significant support for ensuring the service was available to as many small businesses as possible and for the SB to be able to draw particular attention to the poor payment practice of serial offenders. We have made a small number of changes to the policy following the consultation. These have been integrated into the draft Regulations and are outlined below:
  - A simplification of the head count calculation for eligibility of small businesses for the service
  - Clarification of the point at which headcount is calculated
  - Enabling the SBC to extend the time limit for making a complaint to small businesses who have started, but abandoned court proceedings before a judgement (e.g. because of cost)
  - Requiring the SBC to consider whether the respondent to a complaint has acted or not acted on any previous recommendations when deciding whether to publicly name them.
  - Committing the government to commencing relevant sections of the Enterprise Act 2016 in April 2017 to enable the SBC to receive complaints on matters that occurred before the date the complaints scheme formally begins (1 October 2017). This will broaden access to the complaints service and help the SBC build momentum.
- 1.4 These changes have been integrated into the draft Regulations at Annex B, which are provided for comment (see [Section 3 – The Consultation Process](#)).

## 2. Introduction

- 2.1 The government is committed to tackling unfair payment practices, including late payment, to make the UK the best place in Europe to grow and start a business, and increase transparency around payment practices. We have established a Small Business Commissioner (SBC) through provisions in the Enterprise Act 2016. The SBC's role is to support small businesses to resolve payment disputes, and to avoid future issues by encouraging a culture change in how businesses deal with each other. The SBC will provide general advice and information, direct small businesses to existing dispute resolution services such as mediation and handle complaints about payment issues. The Act says that further detail of the SBC's complaints handling functions will be set out in Regulations. This consultation process has been about developing these Regulations, to ensure there is transparency around key processes for business.
- 2.2 We emailed 144 individuals and organisations the hyperlink to the consultation document. We published the consultation document online and via Citizen Space (our online response tool) and we publicised it through the department's digital media channels and those of our partners. We also invited representatives from a range of small businesses and larger businesses to two stakeholder discussions during the consultation period.
- 2.3 65% of the responses we received were from representative bodies, trade associations and professional bodies.
- 2.4 This document sets out the government response to the written consultation submissions, supplemented by additional views received during the stakeholder discussions. It also sets out where we have decided to make small changes to the approach set out in the consultation document following further consideration of the policy.
- 2.5 The draft Regulations are included from page 25. Comments on these regulations will begin on **24 February 2017**, and will run for two weeks, closing on **9 March 2017**.
- 2.6 Please email any comments on the draft regulations to: [SBCPolicy@beis.gov.uk](mailto:SBCPolicy@beis.gov.uk) clearly marked as a response to the "Draft Statutory Instrument: The Small Business Commissioner". This mailbox will be monitored on a daily basis. If further information or clarification is required, we will make contact as appropriate.
- 2.7 If you would prefer to reply by post, you can send a response to:

**Tinu Fagbayi**

Small Business Commissioner Secondary Legislation  
Department for Business, Energy and Industrial Strategy  
1 Victoria Street  
Westminster  
London SW1H 0ET

## 3. Consultation process

- 3.1 The consultation asked for views on several proposals and a series of questions on four key areas:
- Small businesses in scope of the Small Business Commissioner’s (SBC) services.
  - Making complaints under the SBC complaints scheme.
  - How the SBC will consider and determine complaints and make recommendations – specifically, matters for the SBC to take into account in determining whether an act or omission complained of was fair and reasonable.
  - Publishing reports and recommendations on complaints – specifically, factors for the SBC to take into account when deciding whether to name the respondent in a published report.
- 3.2 We received a total of 23 written responses to the consultation. These included 9 from business representative bodies (39%), 5 from professional bodies (22%) and 7 from small businesses (30%). One response was from an individual.
- 3.3 A list of organisations and businesses that responded to the consultation is at [Annex A](#).
- 3.4 In addition to the formal consultation, BEIS conducted two events with a range of stakeholders. These discussions allowed us to gain direct stakeholder feedback on the proposals outlined in the consultation. We also met with key stakeholders individually throughout the period.
- 3.5 The following sections provide the summary of the responses received and our consideration of them. This has fed into the drafting of the Regulations in Annex B.

## 4. Summary of responses and government response

### A. Small business in scope of the Commissioner's services

- 4.1 The consultation document set out proposals for calculating a business's staff headcount to determine whether they are a 'small business' which can use the Small Business Commissioner's (SBC) services. The Enterprise Act 2016 defines a small business for these purposes as any person carrying out one or more businesses with a headcount of less than 50 staff, their registered office or principal place of business in the UK, and which is not a public authority. The consultation document proposed that the headcount figure refer to the number of individual staff rather than full time equivalents and defined the types of worker to be included and excluded. It was proposed that turnover and balance sheet criteria should not be included in the Regulations. The consultation document also made proposals on the point at which the headcount could be calculated to avoid penalising small businesses with headcounts that fluctuated over time. The rationale was to keep the definition as simple as possible for users and the SBC and to remain as close as possible to the threshold in the definition of small business under the Small Business, Enterprise and Employment Act 2015.

#### **Q1. Do you agree with the proposals set out in paragraphs 6.2-6.7 for how and when to calculate a business's staff headcount to determine whether they are a 'small business' which can use the Commissioner's services?**

##### ***Summary of responses received***

- 4.2 We received 21 responses in total to this question. 67% of these agreed with the proposals set out in the consultation for how and when to calculate a business's staff headcount. The majority of respondents argued that the definition should be kept as clear and simple as possible, reducing time and cost for small businesses making complaints. They agreed that the proposal met these criteria.
- 4.3 33% of respondents indicated that they did not agree with the proposals and stated that they would exclude too many businesses from using and benefitting from the SBC's services. One respondent proposed that the headcount figure should refer to the number of full-time equivalent staff working in a business and not the number of individual staff, because some businesses may employ a large number of part-time staff. Another respondent argued that if a small business is part of a larger group and as part of that group has access to greater resources, they should not be able to use the scheme.
- 4.4 A separate respondent argued that the government should adhere more closely to the definition at Section 33 of the Small Business, Enterprise and Employment Act 2015, including balance sheet and turnover criteria as well as headcount. This would avoid businesses with small headcount but large financial resources

complaining against better staffed but less profitable firms. There were also questions about how headcount might be verified and concerns that this would prove time-consuming for the Commissioner.

### **Government response**

- 4.5 The government's aim in providing a definition of headcount is to keep it simple for small businesses and the SBC to understand and apply and to ensure the services are available to a wide range of businesses. The calculation is also intended to be consistent with the definition of small businesses under the Small Business Enterprise and Employment Act 2015. We think the approach set out in the consultation document achieves this by including the use of staff headcount rather than full time equivalent, not excluding businesses that are part of a larger group and avoiding the complexity of turnover and balance sheet measures. We think this approach will benefit the majority of small businesses who are likely to use the service. We have, however, made some changes to the approach as set out in the consultation document, to further support these aims by removing agency workers and secondees from the headcount calculation. This will make it easier for small businesses to calculate their headcount, increase the coverage of the service and remove unnecessary detail (e.g. secondees do not require separate provision in the Regulations). We will, however, contrary to our original proposal in the consultation document, include apprentices in the headcount figure. This is consistent with government policy to establish parity between apprenticeships and other routes into employment.
- 4.6 We have also made a change to the point at which headcount should be assessed for the purposes of determining eligibility. In the consultation we proposed making a calculation over the previous or current "financial year" for businesses that had fluctuating numbers of staff. However, we considered that many of the businesses using the SBC's services would not be companies (but rather self-employed). Therefore, we have changed this to "tax year" and defined tax year by reference to the period in which they are assessed for income or corporation tax. We have also changed the point at which the headcount will be calculated. The consultation document said at paragraph 6.6 that businesses seeking to make a complaint should "meet the headcount criterion at the point the complainant first became aware of the issue which forms their complaint". However, we have considered that this date may be difficult for small businesses and the SBC to determine. Therefore, we have decided that the complainant should meet the headcount criterion on the date on which the matter to which the complaint relates took place or started to take place.
- 4.7 At this point we need to clarify the final sentence in paragraph 6.3 of the consultation document, "We do not propose to cover self-employed individuals". This sentence refers to inclusion in the headcount calculation, not eligibility for the Commissioner's services. Self-employed individuals that are, or run, a business are eligible for the service.



## B. Making complaints under the Small Business Commissioner complaints scheme

- 4.8 The consultation proposed key aspects of the complaints scheme to be set out in the Regulations. These included the circumstances in which a small business should be able to complain to the SBC without raising the issues with the respondent first. It was proposed that this should only be allowed when the SBC is satisfied that communicating the substance of the complaint to the larger business would be significantly detrimental to the complainant's business. The consultation also proposed a time limit of 12 months for complaints and that the SBC should be given the discretion to extend this in certain circumstances. The consultation document also proposed that complaints to the SBC should be made in writing, include the relevant dates, confirm that efforts had been made to communicate the issues to the subject of the complaint and provide any rationale for seeking an extension to the time limit for making a complaint. It was proposed to leave considerations of how to confirm eligibility to the SBC to devise. Proposals were also made on the circumstances in which the SBC could dismiss a complaint, including matters considered to be frivolous or vexatious and if the complaint had been addressed or was more suitably addressed by a different means (e.g. legal proceedings, relevant ombudsman etc.). The consultation also set out that the SBC should be able to fix and extend time limits for any part of the process; notify complainants and explain why a complaint has been dismissed and to allow, but not require the SBC to notify the person against whom a complaint had been made if it as subsequently dismissed.

### **Q2. Are there any circumstances, instead of or in addition to those specified in paragraph 6.11, where it would be appropriate for the small business to complain to the Commissioner without first raising the issue with the respondent?**

#### ***Summary of responses received***

- 4.9 We received 17 responses to this question. Broadly, the 17 respondents were supportive of the proposals but over half (53%) had additional suggestions. The consultation document proposed that the small business could complain to the SBC directly "When the Commissioner is satisfied that communicating the substance of the complaint to the respondent would be significantly detrimental to the complainant's business". Respondents asked for clarification of "significantly detrimental". There were also various arguments made for small businesses being allowed to complain directly to the SBC in all cases. For example, one respondent suggested that certain businesses (self-employed, firms experiencing restricted cash flow or the threat of insolvency, firms less than two years old) should be able to raise a complaint to the SBC without raising it with the respondent. Another also thought that businesses should be allowed to come straight to the SBC to enable him or her to gain a direct understanding of the late payment landscape.
- 4.10 Several respondents said that intermediaries acting on behalf of small businesses should be able to bring complaints. For example, freelancers raising a complaint about a client should be able to complain through an agency, trade association or

business representative body who would submit complaints on behalf of members. This might include grouping complaints against a single larger business together.

### **Government response**

- 4.11 The government thinks, as set out in the Enterprise Act 2016, that in most cases it is right for all small businesses to raise the issue with the larger business first to give them a reasonable opportunity to address it. It is a key objective of the SBC to encourage businesses to solve disputes between themselves. We do recognise that in certain circumstances small businesses may legitimately fear the consequences of raising an issue directly with their larger customer. However, the circumstances are likely to vary significantly between cases. We think the best approach is to leave a decision on what is “significantly detrimental” to the SBC on a case by case basis. When making a complaint a small business will have to confirm whether they have approached the larger business first and if not, why not? The SBC will be able to make a decision and provide advice based on the evidence of the case. The SBC could also consider producing guidance on this question. We do not want to create a two track complaints system by exempting start-ups or the self-employed from the broader approach, particularly when it will be possible to resolve many disputes without the SBC’s direct intervention.
- 4.12 On arguments for intermediaries making complaints, the Commissioner’s complaints process is designed to be simple and straight forward, and fair and impartial toward both parties, providing the necessary support and reassurance for a small business making a complaint and also striving to find a solution that both parties can live with. We are, therefore, not convinced that small businesses will require another organisation to act on their behalf and it is possible it may have the unwanted consequence of making the scheme more adversarial than necessary. The SBC is also designed to assist individual businesses in determining particular disputes on a case by case basis. However, this does not prevent the SBC identifying themes across sectors, markets or relevant to particular supply chains or businesses, drawing attention to these and making appropriate recommendations. The most appropriate tool the SBC has for doing this is the annual report to the Secretary of State for BEIS.
- 4.13 Separately, the government has consulted on a proposal for business representative bodies to have wider powers to challenge certain terms and practices relating to payment periods or late payments, if they are grossly unfair. This would ensure small businesses have a full range of options open to them. We will publish the response to this consultation shortly.

### **Q3. What should be the time limit for complaints to be made to the Commissioner, should the Commissioner be able to extend it, and in what circumstances (other than those listed)?**

#### **Summary of responses received**

- 4.14 We received 14 responses to this question. The majority of respondents agreed that 12 months was a reasonable time limit (12 of 14 respondents, or 86%, answered 9-12 months). There were other suggestions ranging from six weeks to six years. One recommendation was made of 18 months, particularly in the early stages of the SBC’s existence to ensure small businesses were fully aware and able to take

advantage of the service. Another respondent argued that the limit should be six years on the basis that this would reflect time limit for recovering statutory interest on a debt.

- 4.15 There were some suggestions for additional circumstances under which the SBC should be able to extend the time limit, although a number of these were already covered by the five proposed such as if the respondent to a complaint agreed to the extension or if they had acted in a way to cause the time limit to be exceeded.

### ***Government response***

- 4.16 The government believes that 12 months provides a reasonable time limit for complaints to be submitted to the Commissioner. This is supported by respondents and allows a sufficient period for the small business to become aware of the issue and the SBC's services, raise the issue with the larger business, attempt to resolve the matter and then gather evidence and make a complaint. We are aware of other ombudsman schemes that have backstop periods of up to six years from the event complained of. Unlike some of these other schemes, the SBC's determinations are not legally binding and therefore a single, simple time limit is more appropriate.
- 4.17 The SBC will be able to extend the time limit in the circumstances proposed in the consultation. We have also added a criterion as to when the SBC can extend this time limit. This will be where the matter to which the complaint relates has previously been subject of adjudication proceedings which were discontinued before a determination was made. However, this cannot override the provisions in the Enterprise Act 2016 which make clear that where the complainant small business has a statutory right to refer the complaint for adjudication, the complaint cannot be heard by the SBC.

**Q4. Do you agree that complaints referred to the Commissioner should meet the requirements set out in the consultation document? Please list any other requirements that should be considered.**

### ***Summary of responses received***

- 4.18 We received 15 responses to this question. Most respondents agreed with all the requirements detailed in the consultation. All 15 respondents supported the requirements that: complaints to the SBC should be made in writing, include the relevant dates and confirm that efforts had been made to communicate the issues to the subject of the complaint. 14 respondents supported the requirement for complaints to provide any rationale for seeking an extension to the time limit for making a complaint. They emphasised that the process of making a complaint should avoid unnecessary complexity which might put off small businesses from complaining.
- 4.19 There were also suggestions relating to verification and decision-making. Several respondents suggested that complainants should be asked to declare the accuracy of the information provided in making a complaint, to reassure larger businesses. A respondent suggested the SBC's decision on eligibility should be final.

**Government response**

- 4.20 Although it was not covered in the consultation document, we have included in the Regulations those elements of the definition in the Enterprise Act of a “relevant complaint” which should be within easy knowledge of the person making the complaint. This will make it easier for the SBC to determine whether a complaint is eligible. The SBC will be able to take a view on the other elements of a “relevant complaint”, such as whether the small business has a statutory right to refer the complaint for adjudication, from the evidence available and inform the complainant accordingly.
- 4.21 We have decided not to require a complainant to verify the accuracy of the information they are providing. The SBC will promote good faith and trust between the parties and will quickly get to any issues of inaccurate information. We have decided not to include that decisions made by the SBC on the eligibility of complaints are final. This is because we have taken the decision to avoid unnecessary legalistic processes that are likely to put off small businesses or processes such as an appeals mechanism which will become a burden to the office. We will leave it to the SBC to find the best course of action and a satisfactory outcome for small businesses in each case.
- 4.22 We have also added a clarification of what constitutes ‘presenting a complaint’ for the purposes of meeting the time limit, for example that complaints submitted electronically are taken to be submitted on the day of transmission. This is so that potential complainants will be very clear on whether they have submitted on time.

**Q5. Do you agree that the Commissioner should be able to dismiss a complaint in the circumstances set out in the consultation document?****Summary of responses received**

- 4.23 We received 15 responses to this question. Broadly speaking there was agreement with the proposals in the consultation and with the premise that the SBC’s time and resources should be focused effectively; more than 80% of the 15 respondents supported all of the reasons for dismissal. A small number of respondents, however, took issue with a number of the proposals on the basis that they would prevent wider abuses by larger businesses being brought to light.
- 4.24 Several respondents argued there should be an appeals process. Other respondents suggested that the SBC should be able to make a definitive judgement on dismissing a case to avoid getting bogged down in vexatious cases. Further responses requested that the SBC set out clearly the reasons for a case being dismissed and seek to provide the complainant with appropriate advice.
- 4.25 In reference to the construction industry, one respondent proposed that greater clarification was required in respect of the circumstances where a party can submit a complaint to the SBC and which complaints may be referable to statutory adjudication.

**Government response**

- 4.26 We have considered the comments that complainants should have the ability to challenge the SBC's decision to dismiss a complaint. The government has decided that it is important to give the SBC the scope to dismiss a complaint where he or she thinks it is just and reasonable to do so. This is to ensure that the SBC's time and resources are focused effectively and efficiently.
- 4.27 There is no provision for an appeals process for the dismissal of complaints. The SBC will set out his or her reasons for dismissing a complaint and provide appropriate advice and information to the complainant or direct them to other support. In this way the complainant will receive an appropriate outcome. This fits with the SBC's facilitative rather than adversarial approach to businesses using the service.
- 4.28 The SBC's general information and advice function will be able to provide guidance on statutory adjudication in the construction industry and how this relates to complaints. We will expect that the SBC will direct complaints from the construction industry to the right service to meet their needs.
- 4.29 We have clarified in the Regulations that the SBC will be able to extend the time limit when complainants have been to court but not reached a judgement (i.e. which were dropped by the small business on the basis of cost etc.). We have also added that the SBC will be able to 'dismiss' a complaint if the small business asks for it to be withdrawn (which the business is able to do at any time).

**Q6. Do you think there are specified circumstances in which the Commissioner should be able to dismiss a complaint, which are not covered by the general factors listed?****Summary of responses received**

- 4.30 We received 15 responses to this question, and 87% of these respondents did not think there should be any specified circumstances in which the SBC should be able to dismiss a complaint, which are not covered by those listed in the consultation document.

**Government response**

- 4.31 The government will not list any specified circumstances in the Regulations as none was identified by respondents to the consultation.

**Q7. Do you agree that the Commissioner should be able to fix and extend time limits for any aspect of the complaints handling process?****Summary of responses received**

- 4.32 We received 16 responses to this question. There was a widespread agreement from those who responded (94% of the 15 respondents) that the SBC should be able to fix and extend time limits. There was a general consensus that this was important to enable the SBC to make efficient, timely judgements, particularly where this was important to a small business's cash flow or survival. Several respondents flagged the risk that this ability would avoid larger businesses seeking to delay

complaints proceedings on purpose. There was also agreement to giving the SBC some flexibility to deal with exceptional circumstances. One respondent did stress the need to ensure time limits were reasonable and broadly consistent with other similar ombudsmen.

### ***Government response***

- 4.33 The government will include the ability of the SBC to fix and extend time limits for any aspect of the complaints process in the Regulations. We have also set out examples of the matters for which the SBC can fix and extend time limits (for example, the period during which the SBC must give the respondent the opportunity to make representations about the complaint).

### **Q8. Do you agree that the Regulations should require the Commissioner to notify a complainant if their complaint is out of scope or dismissed, and explain the reasons why it will not be considered?**

#### ***Summary of responses received***

- 4.34 All the respondents who answered this question (15 responses) agreed that the Regulations should require the SBC to notify a complainant if their complaint is out of scope. All stated that the process needs to be clear and transparent and provide a rationale, general guidance and signposting to appropriate support or further information.

### ***Government response***

- 4.35 The Regulations will require the SBC to notify a complainant if their complaint is dismissed or out of scope.

### **Q9. When a complaint is not relevant, or dismissed, should the Commissioner be allowed but not required, to notify the person against whom a complaint is made?**

#### ***Summary of responses received***

- 4.36 We received 15 responses. Opinion was split on this question (44% Yes and 56% No). Some respondents argued that requiring the SBC to notify the person against whom a complaint is made, could negatively affect the small business.
- 4.37 A number of respondents, however, suggested it would be right to inform the subject of the complaint so that they can take any corrective action arising from the complaint details. It may also be helpful for an organisation to understand the reasons why a small business is unhappy around certain aspects of their relationship. In addition, another respondent stated that it may be necessary to inform a respondent if a law had been broken.

### ***Government response***

- 4.38 The government has taken all views into consideration and decided that the SBC should be allowed but not required to inform a person against whom a complaint is made. There may be instances in which it is necessary to do so; however we will expect that the SBC will always take the interest of the small business into account.

## C. The Commissioner's consideration and determination of complaint

4.39 The consultation asked for views on how the SBC should decide a complaint by reference to what he or she considers being fair and reasonable in the circumstances of a case. The consultation document proposed a series of factors that the SBC should take into account in determining whether an act or omission by the respondent was fair and reasonable. These included: the relevant facts; the conduct, behaviour and practice of the parties; the relative bargaining position of the parties and the use of that position by the stronger party to the detriment of the weaker party and the impact of the act or omission. The consultation also set out the intention not to include specific indicators for each of these factors in the Regulations. This was to allow discretion for the SBC and provide the option for him or her to subsequently provide further detail by issuing guidance, benefiting from the experience of determining actual complaints.

**Q10. Do you agree that the Regulations should require the Commissioner to take into account the conduct, behaviour and practice of the parties but that examples of these should not be listed in the Regulations, leaving the Commissioner to decide what to include in this consideration?**

### *Summary of responses received*

- 4.40 We received 18 responses to this question. The majority of respondents (15 of 18 respondents – 94%) supported the principle of allowing the SBC to decide what to include in the consideration of the conduct, behaviour and practice of the parties and that it was sensible to give the SBC flexibility to produce his or her own guidance based on the experience of determining complaints. Several respondents agreed that it would be too difficult to be exhaustive and that being too prescriptive might risk deterring small businesses from raising a complaint if their problem is not included in the list of examples. One respondent also pointed out that being too specific may prevent the SBC from addressing new developments and encourage unscrupulous businesses to indulge in negative behaviour that was not explicitly included in the Regulations. Respondents also acknowledged that reviewing or changing secondary legislation on a regular basis would be difficult and confusing.
- 4.41 However, one respondent argued that it is absolutely vital that the Commissioner lists the conduct, behaviour and practice of parties in the Regulations, specifically so that what is defined as late payments and unacceptable poor payment practice can be better understood by the whole business community. As a result they argued that the practices listed in the Regulations should also be reviewed on an annual basis as it would address concerns that the SBC's scope was too prescriptive.
- 4.42 Another respondent argued that from the perspective of larger businesses, giving the SBC full discretion was too open ended.

**Government response**

4.43 The government has considered the respondents' views. On balance, we have decided to adhere to our original proposal to state in the Regulations that the SBC should take into account the conduct, behaviour and practice of the parties and leave it to his or her discretion what to include in this consideration. This provides the SBC with the option of subsequently providing further details of the standards of behaviour and conduct which he or she may consider and expect by issuing guidance, benefitting from the experience of determining actual complaints. The SBC has been provided with a sufficient framework in which to determine complaints, but also with sufficient discretion to deal with complex individual cases on their merits and build up their own interpretation of conduct, behaviour and practice over time.

**Q11. If you answered No to Question 10 and think the Regulations should set out specific indicators of behaviour, conduct and practice and for the Commissioner to assess compliance with these, which of the following, or any other indicators should be included?**

**Summary of responses received**

4.44 We received three responses to this question as only three respondents answered No to Question 10. One respondent provided an extensive proposal which argued that the SBC should include the following key practices of supply chain bullying and assess compliance with these practices:

- (i) Flat fees – ‘pay to stay’’: Also known as ‘supplier assessment charges’ or ‘supplier investment payments,’ the respondent characterised these as flat charges which companies levy on suppliers either as a requirement to be on a supplier list, or packaged as an investment into hypothetical future business opportunities.
- (ii) Excessively long payment terms – ‘pay you later’’. This might include companies insisting on payment terms of 90 or even 120 days.
- (iii) Exceeding payment agreements – ‘late payment’’: Including long payment terms, exceeding agreed terms, or changing terms retrospectively.
- (iv) Discounts for prompt payment
- (v) Retrospective discounting, firms seeking to apply retrospective discounts to outstanding money owed to a supplier, unilaterally changing the terms of the contract.

4.45 In addition, another respondent suggested specific indicators including whether commercial pressure and threats were applied by the larger company, and whether the larger company failed to respond to communications from the other party.

**Government response**

4.46 As we have decided not to set out specific behaviour conduct and practice in the Regulations, for the reasons set out above, we will not be including specific indicators. This includes the practices listed above in paragraph 4.40. All the practices are often used voluntarily by contracting businesses and we do not want



to intervene in what may be mutually beneficial contractual arrangements. In many cases they may be highly detrimental to the interests of the small business, but the best way to assess this is for the SBC to consider the facts of the individual case; the conduct, behaviour and practice of the larger business; its relative bargaining position and the impact of its actions. Also it is unlikely that any list of practices would be exhaustive and they could be sidestepped and replaced by others.

**Q12. Do you agree that the Commissioner should consider the relative bargaining position of the parties and the use of that position by the stronger party to the detriment of the weaker party when considering what is fair and reasonable?**

***Summary of responses received***

- 4.47 All respondents (15 in total) agreed that the SBC should consider the relative bargaining positions of the parties when considering what is fair and reasonable.
- 4.48 One respondent argued that that the SBC should recognise the relative bargaining powers of the parties to the dispute, but that they must consider if the conduct of the stronger party is reasonable in the light of the circumstances.

***Government response***

- 4.49 We will include this in the Regulations as proposed.

**Q13. Do you agree that the Commissioner should consider the impact of the act or omission when considering what is fair and reasonable but that particular impacts should not be listed in the Regulations?**

***Summary of responses received***

- 4.50 We received 15 responses to this question. All respondents agreed that the SBC should consider the impact of the act or omission when considering what is fair and reasonable. They agreed that the particular impacts should not be listed in Regulations.
- 4.51 One respondent suggested that examples of what constitutes an act or omission should be in the SBC's guidance material. Another said that a prescriptive or prohibitive list could not possibly hope to meet the wide and ever-changing circumstances that will occur in the commercial sphere. They wanted the SBC to assess all complaints on a case-by-case basis by examining only the particular facts of that complaint.

***Government response***

- 4.52 The government will include this in the Regulations as proposed in the consultation document.

#### **Q14. If you think particular types of impact should be listed, which should be included in the Regulations?**

##### ***Summary of responses received***

- 4.53 We received 15 responses to this question. Most respondents (14 out of 15) agreed that particular types of impact should not be listed. One respondent stated, however, that the impact of businesses' ability to continue trading should be included in the Regulations.
- 4.54 A small business stated that threats whether direct or implied to withhold business or 'to spread the word' about a supplier with the intent to damage business should be included in the Regulations.

##### ***Government response***

- 4.55 We will not list types of impact in the Regulations, as proposed. The list of impacts in the consultation document was not exhaustive. We would expect the suggested or similar impacts to be included in the SBC's consideration, but we will leave this for the SBC to set out in guidance.

#### **Q15. Are there any other factors that should be included in the Regulations (in addition to the four proposed)?**

##### ***Summary of responses received***

- 4.56 We received 14 responses to this question. The majority of respondents (12 out of 14) did not think any other factors should be included in the Regulations (in addition to the four proposed).
- 4.57 Another respondent suggested including two additional factors in the Regulations:
- (i) Whether the same or similar complaints against the respondents have been submitted to the SBC on previous occasions and the Commissioner has upheld the complaints;
  - (ii) Whether the respondent has ignored previous recommendations of the SBC;
- 4.58 One respondent argued that some consideration should be given to the overall number of payments made by a business that is the subject of a complaint both to the complainant and in general.

##### ***Government response***

- 4.59 The government will not list other factors in addition to the four proposed. The SBC will determine each complaint on the facts of each case. Previous cases, or the overall number of payments a respondent makes, will not be relevant to his or her consideration.

**Q16. Do you agree that the Regulations should not list specific types of cases nor therefore corresponding additional factors that the Commissioner must take into account when determining what is fair and reasonable in those specific types of cases?**

***Summary of responses received***

- 4.60 All respondents (12 in total) agreed that the Regulations should not list specific types of cases when determining what is fair and reasonable.
- 4.61 One respondent accepted that the Regulations must not be too prescriptive but believed that some specific types of cases should be listed as they are so widespread. They argued that if the Regulations were reviewed on annual basis, concerns over the SBC's scope being too prescriptive can be addressed.
- 4.62 Another respondent stated that it is reasonable not to list specific types of cases in order to avoid the risk of any specified practice being seen as the only practices covered by the SBC.

***Government response***

- 4.63 The government will not specify any specific circumstances in the Regulations when determining what is fair and reasonable.

**Q17. If you answered No to Question 16, what should the specified circumstances be? And what should the additional factors be in relation to those circumstances.**

***Summary of responses received***

- 4.64 We received one response to this question. The respondent argued that practices of supply chain bullying should be listed in the Regulations.

***Government response***

- 4.65 We will not specify any specific circumstances in the Regulations.

## D. Publishing reports and recommendations

4.66 The SBC must produce a report on each complaint and has the discretion to make it public, naming the respondent to the complaint, in order to bring good and poor practice to light and impact on culture change in payment practice. The consultation outlined the factors that the SBC will need to take into account when deciding whether to name a respondent. These factors included: representations made by the complainant and respondent; whether the respondent deliberately misled the complainant or the SBC; whether the respondent used undue influence, pressure or intimidation tactics; evidence as to the risk of personal harm to any staff of the respondent; evidence of the seriousness of harm caused to the small business; evidence of the respondent's knowledge of that harm; whether naming the larger business will act as a deterrent; whether naming is likely to encourage good practice; whether naming the respondent will have an adverse effect to the supplier and whether the respondent has helpfully engaged with the SBC's process.

**Q18. Which factors (including but not confined to those listed below) should the Regulations set out for the Commissioner to take into account when considering whether to name respondent in a published report?**

### *Summary of responses received*

- 4.67 We received 15 responses to this question. The majority of those who responded agreed with the set of factors listed in the consultation document, for the SBC to take into account when deciding whether to name the respondent in a published report. In total, 9 of the factors received 100% support and two factors (risk of personal harm to staff of the respondent and respondent's knowledge of harm to the complainant) received more than 80% support.
- 4.68 Several respondents argued forcefully that the previous track record of the larger business should be taken into account in relation to the number and severity of complaints to the SBC and whether the respondent has consistently ignored the SBC's recommendations.
- 4.69 Another respondent said that naming and shaming should be clearly set out so that it is not only fair but seen to be fair. They argued that 'naming and shaming' should be limited to circumstances in which a company has broken the law, ignored contractual obligations or not lived up to a code which it has signed. The respondent stated that the company should not be named and shamed simply to deter others. They also stressed that when a decision is made not to name and shame, care must be taken to ensure the company involved cannot be identified.
- 4.70 A couple of respondents commented that consideration to name should include any potential harm to other businesses, for example in the supply chain.
- 4.71 Several respondents stated that the Regulations should be balanced and clearly demonstrate that the SBC will consider naming a respondent to a complaint in order to praise them for exemplary practice as this will equally contribute to positive culture change.

**Government response**

- 4.72 The ability to name a respondent to a complaint in a published report is a key power of the SBC and will enable the SBC to draw attention to poor and good practice. It is an essential tool for the SBC to effect a culture change in the way in which businesses deal with one another. Before a decision is taken on whether to name a respondent, the SBC will have already considered whether the behaviour of the respondent has been fair and reasonable in the thorough process that has been described in the consultation document. If the SBC makes a decision to publish a report, but not to name the respondent to the complaint, every effort will be made to avoid revealing their identity.
- 4.73 We have added to the Regulations one additional matter which must be taken into account by the SBC. This is whether the respondent has acted or not acted on any previous recommendations made to the respondent by the SBC. We were convinced by respondents that the broader record of behaviour of a respondent to a complaint should be considered when deciding whether to name them in the publication of a report. We decided this was very different to considering the previous track record of a business when determining an individual case on facts, which we do not intend the SBC to do. We think serial offenders and those larger businesses that choose not to follow the SBC's recommendations should be named more readily to draw attention to this poor practice and support culture change.
- 4.74 We have also added to the Regulations a reference to 'third party' when stating that the SBC should consider whether the respondent used any undue influence, pressure or intimidation tactics in its dealings. This is intended to capture the respondent's behaviour towards any other businesses in the supply chain.
- 4.75 We have ensured that we have drawn out in the Regulations a clear reference to the fact that the SBC may decide to name a respondent to a complaint to showcase the best practice they have demonstrated in engaging with the SBC and addressing the payment issue with the complainant. As we set out in the consultation document, we believe this will make an important contribution to culture change.

**Q19. If you disagree that there should be no specified circumstances that give rise to additional factors that the Commissioner must take into account when deciding whether to name the respondent, what should these circumstances be? And what factors should the Commissioner consider?**

**Summary of responses received**

- 4.76 No responses was received for this question.

**Government response**

- 4.77 We will not set out any specified circumstances on the basis that we do not want to limit the SBC. The general factors will enable the SBC to deal with a range of issues.

**Q20. Is there anything else you consider the Regulations should cover or do you have any comments on the consultation?*****Summary of responses received***

- 4.78 We received six responses to this question. There were several recommendations on the ability of intermediaries to bring complaints on behalf of small businesses or groups of small businesses. These are addressed above. There were some suggestions about how the SBC presents data about complaints and recommendations to improve the culture of UK payment practice. One respondent also remarked that it would be helpful to have additional guidance on the type of complaints the SBC will receive. A small number of respondents proposed significant changes to the policy that are outside the scope of these Regulations and the powers given to the SBC in the Enterprise Act 2016. These included suggestions that the determinations of the Commissioner should be legally binding, that the SBC should be able to impose sanctions and that there should be significant devolution of the SBC's powers.
- 4.79 One respondent raised the question of whether the SBC will only be able to receive complaints on matters that occur after the date when the SBC commences his or her work. This would exclude any complaints that refer to a matter prior to this date. The respondent argued that an earlier date should be chosen to ensure that the SBC is able to help as many small businesses as possible and give it momentum when it launches.

***Government response***

- 4.80 We cannot consider any suggestions for these Regulations which are outside the powers given to the SBC by the Enterprise Act 2016. We have covered arguments relating to intermediaries above. The SBC will be able to provide information about complaints and make relevant policy recommendations in the annual report to the Secretary of State for BEIS.
- 4.81 We have considered the issue of commencement date and agree that it would be beneficial for the SBC to be able to receive complaints on matters that occurred before the date the complaint scheme formally begins. This will enable the SBC to start making an impact right away. This does represent a change in policy, although this does not contradict anything in the Enterprise Act. We have considered arguments that respondents to complaints will not be aware that their actions could be subject to the attention of the SBC. However, the policy around the SBC has now been publicly available for some time and we have consulted on the policy behind the Regulations and are further consulting now on the wording of the Regulations and therefore we do not agree that businesses will not know that their actions could be the subject of complaints to the SBC. We therefore propose that relevant sections of the Enterprise Act 2016 are commenced early in April 2017 to enable the SBC to consider complaints based on matters that occurred from this date.

## 5. Next steps

You can email comments on the draft Regulations for two weeks to [SBCPolicy@beis.gov.uk](mailto:SBCPolicy@beis.gov.uk)

After this, government will finalise the Regulations and lay them before Parliament for consideration and approval.

## Annex A: List of respondents

Ambition Partner Limited  
Asset Based Finance Association (ABFA)  
Association of Accounting Technicians (AAT)  
Association of Convenience Stores Limited (ACS)  
British Retail Consortium  
Business of Scotland  
Chartered Institute of Arbitrators (CIA)  
Chartered Institute of Credit Management (CICM)  
Civil Justice Council  
Engage Digital Limited  
Federation of Small Business  
Forum of Private Business  
ICAEW  
IPSE  
JEC Vac Solutions Limited  
My Home Survey Limited  
Network Mapping Limited  
ProMediate (UK) Limited  
Specialist Engineering Contractors' (SEC) Group  
Sewconvenient Limited  
The 100 Group  
The Association of Licensed Multiple Retailers



# Annex B: Draft Regulations

*Draft Regulations laid before Parliament under sections 2(9) and 7(11) of the Enterprise Act 2016, for approval by resolution of each House of Parliament.*

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## DRAFT STATUTORY INSTRUMENTS

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**2017 No.**

### **ENTERPRISE**

### **The Small Business Commissioner (Scope and Scheme) Regulations 2017**

*Made* - - - - **\*\*\***  
*Coming into force* - - *[1st October] 2017*

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 2(2), (5), (7)(b) and 7(1) to (3) and (5) to (8) of the Enterprise Act 2016<sup>(1)</sup>(<sup>2</sup>).

In accordance with section 7(9) of that Act, before making these Regulations, the Secretary of State has consulted such persons as the Secretary of State considers appropriate.

In accordance with sections 2(9) and 7(11) of that Act, a draft of these Regulations has been laid before Parliament and approved by a resolution of each House of Parliament.

#### **Citation, commencement and interpretation**

**1.**—(1) These Regulations may be cited as The Small Business Commissioner (Scope and Scheme) Regulations 2017.

(2) These Regulations come into force on [1st October] 2017.

(3) In these Regulations—

“the 2016 Act” means the Enterprise Act 2016; and

“member of staff” has the meaning given by regulation 2(6).

#### **Further provision about the meaning of “small business”**

**2.**—(1) For the purposes of Part 1 of the 2016 Act, a relevant undertaking<sup>(3)</sup> is a small business if it meets any of the following criteria—

(a) it has a headcount of staff of less than 50 on Assessment Date A;

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<sup>(a)</sup> c.12.

<sup>(b)</sup> See section 7(12(b)) of the 2016 Act for the meaning of “specified”.

<sup>(c)</sup> See section 2(10) of the 2016 Act for the meaning of “relevant undertaking”.

- (b) where the relevant undertaking is seeking a determination of a complaint under the SBC complaints scheme<sup>(4)</sup>, it has a headcount of staff of less than 50 on Assessment Date B; or
  - (c) it has an average headcount of staff of less than 50 during any assessment period.
- (2) Assessment Date A is the date on which the relevant undertaking makes contact with the Commissioner.
- (3) Assessment Date B is the date on which the matter to which the complaint relates took place or started to take place.
- (4) The assessment periods are—
- (a) the last tax year of the relevant undertaking that ended prior to Assessment Date A;
  - (b) where a period more than 6 months have elapsed from the date on which the current tax year of the relevant undertaking began and Assessment Date A, that period; or
  - (c) where the relevant undertaking has been carrying on one or more businesses for 6 months or less, the period beginning with the date on which the relevant undertaking began carrying on business and ending with Assessment Date A.
- (5) For the purposes of subparagraph (1)(c) of this regulation, the average headcount of staff is calculated by—
- (a) determining the number of individuals who have been members of staff of the undertaking in each month or part of a month in the assessment period in question (“the monthly numbers”);
  - (b) calculating the total of the monthly numbers by adding together all the monthly numbers; and
  - (c) dividing the total of the monthly numbers by the number of months in the period in question.
- (6) For the purposes of this regulation—
- “headcount of staff” means the total number of individuals who are members of staff of the relevant undertaking;
- a “member of staff” means an individual who—
- (a) works for the relevant undertaking under a contract of employment;
  - (b) does not work for the relevant undertaking under a contract of employment but is a director or other office-holder of the undertaking;
  - (c) where the relevant undertaking is a partnership, is a partner of that partnership (but not where the undertaking is a limited partnership, a limited partner) who does not work for the undertaking under a contract of employment;
  - (d) where the relevant undertaking is a limited partnership registered under the Limited Liability Partnerships Act 2000<sup>(5)</sup>, is a member of that limited liability partnership who does not work for the undertaking under a contract of employment; and
  - (e) where the relevant undertaking is an unincorporated association other than a partnership, is a member of that association who does not work for the undertaking under a contract of employment;
- “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;
- “a tax year” of a relevant undertaking means a period of 12 months for which the undertaking was, is or will be (as the case may be) required to be assessed for liability for income tax or corporation tax (as the case may be).

### Requirements before presenting a complaint to the Commissioner

3.—(1) Before presenting a complaint to the Commissioner, the person making the complaint must (unless the circumstances specified in paragraph (2) apply)—

- (a) communicate the substance of the complaint to the person against whom the complaint is made; and
- (b) give that person a reasonable opportunity to deal with it.

(2) The specified circumstances are where the Commissioner considers in relation to the particular complaint, there is sufficient information to suggest that communicating the complaint to the person against whom the

<sup>(d)</sup> See section 4(1) of the 2016 Act for the meaning of “SBC complaints scheme”.

<sup>(e)</sup> c.12

complaint is made would have a significant detrimental effect on the commercial interests of the person making the complaint.

(3) Where the requirements in paragraph (1) are not complied with the Commissioner must dismiss the complaint or the part of the complaint that did not comply with paragraph (1).

#### **Requirements as to the form and content of the complaint**

4.—(1) The person making the complaint must present the complaint in writing to the Commissioner.

(2) The complaint must include the following—

- (a) the date on which the matter to which the complaint relates took place;
- (b) the details of the complaint, including—
  - (i) whether the person making the complaint has an agreement to supply, has supplied or may supply goods or services to the person against whom the complaint is made;
  - (ii) whether the complaint relates to a payment matter (see paragraph 3);
  - (iii) whether the complaint relates to a provision made or proposed to be made which restricts or purports to restrict any right of the person making the complaint to make a complaint under the SBC complaints scheme;
  - (iv) whether the complaint relates to the appropriateness of the price payable or proposed to be payable under a contract for the goods or services supplied or to be supplied by the person making the complaint; and
  - (v) whether the complaint concerns matters that are currently the subject of legal or adjudication proceedings; and
- (c) a declaration—
  - (i) that the person making the complaint has previously communicated the substance of the complaint to the person against whom the complaint was made; or
  - (ii) setting out the reasons for which the substance of the complaint has not been previously communicated to that person.

(3) A complaint relates to a payment matter if it relates to a request or other act, or a failure to pay or other omission, in relation to a payment—

- (a) for or in connection with the supply of goods or services; or
- (b) in connection with the relationship or possible relationship between the person making the complaint and the person against whom the complaint is made so far as relevant to the supply.

#### **Time limit for presenting a complaint**

5.—(1) The person making the complaint must present the complaint to the Commissioner in accordance with regulation 4 (requirements as to the form and content of complaint) within 12 months from the date on which the matter to which the complaint relates took place (or, as the case may be, the date on which the matter to which the complaint started to take place).

(2) A complaint under these Regulations is taken to have been presented—

- (a) if sent by electronic communication, on the day of transmission; and
- (b) if sent by post in an envelope which is properly address and sent by prepaid post, on the day on which it is posted.

(3) The Commissioner may, where in the opinion of the Commissioner it is fair and reasonable to do so, extend the time limit set out in paragraph (1) in any of the following circumstances—

- (a) where the Commissioner considers that due to the physical or mental incapacity of the person making the complaint or members of staff of the person making the complaint, the person making the complaint is unable to present the complaint within the time limit set out in paragraph (1);
- (b) where the person against whom the complaint is made has given consent to the extension of the time limit;

- (c) where the matter to which the complaint relates had previously been the subject of legal proceedings which have been discontinued before a determining judgment was made and the person making the complaint has acted promptly after the discontinuation of those legal proceedings in presenting the complaint to the Commissioner;
- (d) where the matter to which the complaint relates had previously been the subject of adjudication proceedings (other than where the complaint is excluded from the SBC complaints scheme by section 4(5)(c) or (d) of the 2016 Act<sup>(6)</sup>) which have been discontinued before a determination was made and the person making the complaint has acted promptly after the discontinuation of those legal proceedings in presenting the complaint to the Commissioner;
- (e) where in the Commissioner's view, the reason or the main reason for which the person making the complaint did not make the complaint before the end of the time limit is because that person and the person against whom the complaint is made had agreed a resolution to the complaint but that resolution has not been satisfactorily put into effect by the date on which the complaint was made; or
- (f) where, in the Commissioner's view, there is information to suggest that the person against whom the complaint is made has acted with the intention of ensuring the time limit in paragraph (1) was exceeded.

(4) Where the complaint or part of the complaint is not made within the time limit set out in paragraph (1), the Commissioner must not entertain the complaint.

#### **Power of the Commissioner to fix time limits for other procedural aspects of the proceedings**

6.—(1) Once a complaint has been presented to the Commissioner in accordance with regulation 4 (form and content of complaint) and regulation 5 (time limit for presenting complaint), for all other aspects of the proceedings the Commissioner may—

- (a) fix a time limit relating to the proceedings concerning the complaint; and
- (b) extend that time limit.

(2) The aspects of the proceedings referred to in paragraph (1) include—

- (a) the period during which the Commissioner must give the respondent the opportunity to make representations about the complaint;
- (b) the period during which the Commissioner may give the complainant an opportunity to make representations about the complaint;
- (c) the period at the end of which the Commissioner must make a written statement of any determination of a complaint;
- (d) the period during which the Commissioner must give the respondent and the complainant an opportunity to make representations about the proposed publication of any report made under section 6 of the 2016 Act (reports on complaints), including in the case of the respondent, about any proposal to identify the respondent in a report.

#### **Power of the Commissioner to dismiss a complaint**

7.—(1) The Commissioner may dismiss a complaint if, or to the extent that—

- (a) the Commissioner considers—
  - (i) that the complaint is frivolous or vexatious;
  - (ii) that the complaint concerns matters which are more appropriately dealt with in another way;

<sup>(6)</sup> Section 4(5)(c) of the Enterprise Act 2016 provides that a complaint is excluded from the SBC Complaints Scheme if it falls within the jurisdiction of an ombudsman, regulator or public authority (other than the Commissioner, a court or a tribunal) and section 4(5)(d) of the Enterprise Act 2016 provides that a complaint is excluded from the SBC Complaints Scheme if the complainant has a statutory right to refer the complaint for adjudication by a person other than a court or tribunal.

- (iii) that the complainant has not suffered, and is not likely to suffer, any financial loss, material inconvenience or other material adverse effect, as a result of the matter to which the complaint relates;
  - (iv) that the matter to which the complaint relates has already been remedied;
  - (v) that the complainant is seeking an outcome other than a recommendation of the kind that can be made under the SBC complaints scheme;
  - (vi) that the complaint concerns matters that have been the subject of legal proceedings or adjudication proceedings;
  - (vii) that the matter to which the complaint relates has previously been considered under the SBC complaints scheme or by another complaints-handling body, ombudsman or regulator; or
  - (viii) that there are other compelling reasons why it is inappropriate for the complaint to be dealt with under the SBC complaints scheme;
- (b) it becomes the subject of legal proceedings or adjudication proceedings; or
  - (c) the complainant withdraws the complaint or the complainant otherwise indicates that the complainant no longer wishes to pursue the complaint.

### **Notification of dismissal of complaint**

8.—(1) If the Commissioner dismisses a complaint, or determines that a complaint should not be entertained under the scheme, the Commissioner must notify the person making the complaint in writing and give that person written reasons explaining why the complaint has been dismissed or is not being entertained under the scheme.

(2) In particular, the Commissioner must inform the person making the complaint whether—

- (a) it cannot be considered by the Commissioner because it is not a relevant complaint within the meaning of section 4(3) of the 2016 Act; or
- (b) it is being dismissed because—
  - (i) it falls within regulation 3(3) (complaint not previously communicated);
  - (ii) it falls within one of subparagraphs (1)(a) or (b) of regulation 7 (dismissing a complaint); or
- (c) the complaint is not being entertained under the scheme because it was not made within the time limits set out in regulation 5(1).

(3) If the Commissioner dismisses a complaint, the Commissioner may notify the person against whom the complaint was made.

### **Matters to be taken into account when determining under the scheme whether an act or omission was “fair and reasonable”**

9.—(1) In determining whether an act or omission by the respondent to a relevant complaint was fair and reasonable, the Commissioner must take the following matters into account—

- (a) any relevant law;
- (b) any relevant facts established by the Commissioner during the enquiry into the complaint;
- (c) any relevant conduct, behaviour or practice of the respondent;
- (d) any relevant conduct, behaviour or practice of the complainant;
- (e) the relative bargaining positions of the respondent and the complainant and, where applicable, the use by the respondent of a stronger bargaining position to the detriment of the complainant; and
- (f) the impact of the act or omission on the respondent, the complainant or any third party.

**Factors to be taken into account when deciding whether to identify a respondent in a report made under section 6 of the 2016 Act**

**10.**—(1) Where the Commissioner makes a report under section 6(1) of the 2016 Act (report on complaints), the Commissioner must take the following factors into account when deciding whether to identify a respondent in that report—

- (a) any information gathered during the enquiry into complaint—
  - (i) that the respondent engaged positively with the complaints process and has sought to amicably and fairly resolve the matter to which the complaint relates;
  - (ii) that the respondent deliberately or knowingly misled the complainant;
  - (iii) that the respondent deliberately or knowingly misled the Commissioner;
  - (iv) that the respondent used any undue influence, pressure or intimidation tactics in its dealings with the complainant or any third party;
  - (v) that the respondent has acted or not acted on any previous recommendations made to the respondent by Commissioner;
  - (vi) that identifying the respondent would risk any personal harm to any member of staff of the respondent or the complainant;
  - (vii) that identifying the respondent would have any other adverse consequences for the complainant or the respondent;
  - (viii) as to the seriousness of any financial loss, material distress, material inconvenience or other material adverse effect caused to the complainant by the respondent as a result of the matter to which the complaint relates;
  - (ix) as to the respondent’s knowledge of any financial loss, material distress, material inconvenience or other material adverse effect caused to the complainant by the respondent as a result of the matter to which the complaint relates.
- (b) any representations made by the respondent or the complainant as to whether the respondent should be identified;
- (c) the impact of identifying the respondent in deterring similar acts or omissions in the future; and
- (d) the impact of identifying the respondent in encouraging other undertakings to adopt any good practice of the respondent.

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*



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